Supreme Court, U.S.
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No. 92-937

In The

Supreme Court of the United States

October Term, 1992

RHINE REINSURANCE CO., LTD., et al.,

Petitioners,

v.

CYNTHIA M. MALESKI, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, as Rehabilitator of the Mutual Fire, Marine and Inland Insurance Company,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

(1) Where the specific contract provisions relied upon by Petitioners for their Contract Clause violation claim were not entered into the record below, should this Court consider Petitioners' claim that the Plan of Rehabilitation impairs those contract provisions in violation of Article I, Section 10 of the United States Constitution?

(2) Where the Pennsylvania Supreme Court found that any alleged impairment of Petitioners' contract rights which may have been effected by the Plan of Rehabilitation was insubstantial, should Petitioners' claim that this issue was neither considered nor determined by the Pennsylvania Supreme Court be addressed by this Court?

(3) Where the Pennsylvania Supreme Court examined the Pennsylvania Insurance Department Act and the Mutual Fire Plan of Rehabilitation from the standpoint of the state's legitimate public interest and found that the Plan is reasonably designed to foster the public purpose behind Pennsylvania's rehabilitation statutes, should Petitioners' claim that these issues were neither considered nor determined by the Pennsylvania Supreme Court be addressed by this Court?

(4) Where the Pennsylvania Supreme Court's determination that "mutual" debts must be liquidated as of the date of the filing of a petition for rehabilitation to qualify for setoff was based upon an interpretation of substantive state law, should this Court consider the issue raised by Petitioners regarding that finding?

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COUNTERSTATEMENT OF THE CASE

Of the six Petitioners herein, only three (Rhine Reinsurance Co., Ltd.; the Home Insurance Company; and Nationwide Mutual Insurance Company) were appellants in the state court proceedings. They were included in the group of 46 cedents, who were appellants at Appeal No. 17 M.D. 1990. (A-1.)[1] Petitioners American International Group, Inc., Resolute Reinsurance Company and Arkwright Mutual Insurance Company (or its predecessor in interest, Philadelphia Manufacturers Mutual Insurance Company) were not included in the Notice of Appeal filed in the Pennsylvania Supreme Court at No. 17 M.D. 1990. (A-1.)[2] Hence, they have no standing to file the instant Petition. Accordingly, any reference to "Petitioners" in this brief shall include only Rhine, Home and Nationwide.

Respondent is Cynthia M. Maleski, the Acting Insurance Commissioner of the Commonwealth of Pennsylvania, as Statutory Rehabilitator ("Rehabilitator") of The Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire"). On December 8, 1986, the Commonwealth Court of Pennsylvania entered an Order placing Mutual Fire into rehabilitation pursuant to the Pennsylvania Insurance Department Act (the "Act"), 40 P.S.

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[1] References to Respondent's Appendix are designated as "A-___." References to the Appendix in the Petition of Rhine Reinsurance, et al., are designated as "___a."

[2] There were appellants below identified as AIG Risk Management, Resolute Insurance Company and Arkwright-Boston Manufacturers Mutual Insurance Company, but Respondent is without knowledge as to whether they are the same entities listed as Petitioners here. (A-1.)

§ 221.15(a), and appointing the Insurance Commissioner of the Commonwealth of Pennsylvania as Rehabilitator pursuant to 40 P.S. § 221.15(c).[3]

Mutual Fire is a mutual insurance company which was incorporated in 1902 under the laws of the Commonwealth of Pennsylvania.[4] Before it ceased writing business in 1986, Mutual Fire's business included a broad range of property, casualty and special risks insurance, with substantial reliance upon reinsurance. Mutual Fire is licensed to do business in Pennsylvania, Delaware, New York and Puerto Rico, and operates on a surplus lines (non-admitted) basis in virtually every other state.

Article V of the Act governs the rehabilitation and liquidation of insolvent insurance companies in Pennsylvania. Its stated purpose is "the protection of the interests of insureds, creditors, and the public generally" through, *inter alia*, "equitable apportionment of any unavoidable loss." 40 P.S. § 221.1(c). The Act affords the Insurance Commissioner, as statutory rehabilitator, broad discretion and authority to "take such action as [s]he deems necessary or expedient to correct the condition or conditions which constituted the grounds for the order of the court to rehabilitate the insurer." *Foster v. Mutual Fire, Marine &*

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[3] Under the Pennsylvania Insurance Department Act, the Commonwealth Court is assigned jurisdiction over, and supervisory responsibility for, insurance rehabilitations and liquidations. 40 P.S. § 221.4.

[4] Mutual Fire has no parent company. Mutual Fire's subsidiaries, as defined by Sup. Ct. R. 29.1, are: Endmark Data Processing Corporation; Ryansure Intermediaries, Inc.; Cable Life Insurance Co.; UMI Asset Management; and UMI Holdings.

Inland Insurance Company, 1992 W.L. 210948 (Pa. Aug. 21, 1992) (7-8a), citing 40 P.S. § 221.16(b). This includes the discretion and authority to formulate a plan for rehabilitating an insolvent insurance company. 40 P.S. § 221.16(d).

On January 31, 1989, pursuant to 40 P.S. § 221.16(d), the Rehabilitator submitted to the Commonwealth Court a Plan of Rehabilitation for Mutual Fire (the "Plan"). Various creditors, including Petitioners, who are both cedents to and reinsurers of Mutual Fire,[5] filed objections to the Plan. On July 25, 26, 28, and August 1, 1989, hearings were held before the Honorable James Crumlish, Jr., then President Judge of the Commonwealth Court, to consider the proposed Plan.

The Plan establishes separate classes of creditors based upon the priority of distribution set forth in 40 P.S. § 221.44. Pertinent classes include:

Class 1 – Secured Cedents;

Class 2 – Administrative Claims;

Class 3 – Wage Claims;

Class 4 – Policyholder Claims (which excludes surety bond lenders, cedents and reinsurers);

Class 5 – Surety Bond lenders;

---

[5] Cedents are companies whom Mutual Fire reinsures. Reinsurers are companies obligated to Mutual Fire under contracts of reinsurance, having assumed Mutual Fire business. Mutual Fire Plan, § I(4).

Class 6 – General Unsecured Creditor Claims (including those of cedents and reinsurers).

The Plan directs the Rehabilitator to marshal estate assets, in particular, reinsurance recoveries, which constitute the most significant and substantial asset of Mutual Fire. (Hearing Transcript, T. 40, 44.) Nevertheless, the Plan gives appropriate recognition to the traditional equitable remedy of setoff between cedents and reinsurers. Under Section III(D), mutual debts and credits, to the extent that such obligations were due and owing as of December 4, 1986 (the date on which the Insurance Commissioner filed her Petition for Rehabilitation) may be set off.[6] Thus, the Plan expressly permits creditors to exercise their right to set off matured, liquidated obligations as of the date of the filing of the Rehabilitation Petition. Case reserves as of December 4, 1986 (which are estimates of the amounts required to cover future payments on account of known claims) and IBNR as of that date (amounts predicted to be paid in the future on account of events that have occurred but have not been reported as claims) are not mutual debts under Pennsylvania law and thus, are not available for setoff.

While the Plan allows setoff of mutual debts and credits as stated above, Section III(B) precludes setoff of

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[6] The term "due and owing" refers to reinsurance amounts recoverable on paid Losses (*i.e.*, payments by cedents to policyholders and other claimants), paid Loss Adjustment Expenses, Claim settlements and reimbursement agreements. Mutual Fire Plan, § I(11).

any premium obligations due to Mutual Fire. This provision is based upon Section 221.32(b)(4) of the Act, which expressly prohibits setoff of premium obligations:

> (b) No setoff or counterclaim shall be allowed in favor of any person where:
>
> (4) The obligation of the person is to pay premiums, whether earned or unearned, to the insurer.

40 P.S. § 221.32(b)(4). This provision applies both to rehabilitations and liquidations. (19a.)

In an Opinion and Order dated January 23, 1990, the Commonwealth Court (per then President Judge Crumlish) approved, with certain modifications, the Plan submitted by the Rehabilitator and concluded as follows:

> Having considered all objections and found that the proposed Plan, with modifications, constitutes an equitable apportionment of unavoidable loss, is in the best interests of insureds and other creditors, and does not constitute an abuse of the Rehabilitator's discretion, we modify the Plan consistent with this Opinion and approve it in all other respects.

Grode v. Mutual Fire, Marine & Inland Insurance Company, 132 Pa. Commw. 196, 572 A.2d 798 (1990). (72a.) In particular, the Commonwealth Court modified Section III(D) and imposed the following additional requirements with respect to setoff:

> (i) the Rehabilitator is to notify creditors of her setoff calculations within 90 days of approval of the Plan;
>
> (ii) creditors have 30 days to object to the setoff calculation; and

(iii) any dispute over the setoff calculation is to be resolved pursuant to the claim resolution procedures of Section VII of the Plan. (74a.)

Petitioners appealed this Order to the Pennsylvania Supreme Court and argued, *inter alia*, that Section III of the Plan impermissibly impaired their contractual rights.

The Pennsylvania Supreme Court rejected these arguments. With respect to the question Petitioners have presented for review by this Court, the Pennsylvania Supreme Court made the following specific findings:

(1) Section III of the Plan "ensures that the creditors herein, at a minimum, will fare at least as well under the rehabilitation as they would in a liquidation proceeding," in accordance with *Neblett v. Carpenter*, 305 U.S. 297 (1938). (19a.)

(2) 40 P.S. § 221.32, which establishes what forms of setoff will be permitted, encompasses both liquidation and rehabilitation in Pennsylvania. (19a.)

(3) "Mutual debts and credits" under 40 P.S. § 221.32 are limited to debts which are due and owing (*i.e.*, liquidated, matured) as of December 4, 1986, the date upon which the petition for rehabilitation was filed. (23a, citing *Commonwealth ex rel. Bell v. Tradesmen's Trust Company*, 250 Pa. 372, 95 A. 574 (1915).)

(4) The "speculative and intangible nature" of case reserves and IBNR at the time of the filing of the petition for rehabilitation "does not warrant their being available for setoff. . . ." (23a.)

(5) Under Pennsylvania law, setoff is an equitable remedy and accordingly, "is permissive, not mandatory." (23a.)

(6) Allowing reinsurers/cedents to set off obligations that had not matured as of the filing of the rehabilitation petition would result in a windfall. (23a.)

(7) Section III of the Plan satisfies the three-part test set forth by this Court in *Energy Reserves Group, Inc. v. Kansas Power and Light*, 459 U.S. 400 (1983). (15a-16a.)

As stated, of the 46 cedents who were appellants in the state court proceeding, only three (Petitioners herein) have sought review of the Pennsylvania Supreme Court's decision.

REASONS FOR REFUSAL OF THE WRIT

The specific contract provisions relied upon by Petitioners for their Contract Clause violation claim were not entered into the record below and, therefore, this Court should not consider Petitioners' claim that the Plan of Rehabilitation impairs those contract provisions in violation of Article I, Section 10 of the United States Constitution.

In any event, Petitioners' claim that the Pennsylvania Supreme Court failed to consider the alleged impairment of their contract rights (Petition, p. 14) and whether the Plan furthers a "significant and legitimate public purpose" (Petition, p. 16) is simply wrong, and their reliance upon *Energy Reserves Group, Inc. v. Kansas Power and Light*, 459 U.S. 400 (1983), utterly misplaced. In the first place, the Pennsylvania Supreme Court, applying the test set forth by this Court in *Energy Reserves*, expressly approved the Commonwealth

Court's finding that the Plan *did not* constitute a *substantial* impairment of Petitioners' alleged contractual setoff rights. (15a-16a.) Secondly, it found that the Plan fosters the goals of the rehabilitation statutes and serves a significant public purpose. (14a, 17a, 24a.) Indeed, the Pennsylvania Supreme Court specifically stated that the Plan is "intended for the benefit of the public" (15a); that the State has a "significant interest . . . to regulate the fiscal affairs of its insurers for the welfare of the public" (16a, n.4); and that the Plan "fosters [a] legitimate public purpose" (17a).

The Petitioners seek review of the Pennsylvania Supreme Court's decision approving the Mutual Fire Plan of Rehabilitation because they disagree with that Court's findings and conclusions as to matters of substantive Pennsylvania law, to-wit, (1) the purpose and intent of the Pennsylvania Insurance Department Act and its provisions regulating insolvent insurance companies; and (2) what constitutes "mutual" debts and credits for purposes of setoff under Pennsylvania law. This Court has consistently refused to second guess the interpretation of state law by the highest court of the state. *Hortonville Dist. v. Hortonville Ed. Assoc.*, 426 U.S. 482, 488 (1976); *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981).

A. THE PENNSYLVANIA SUPREME COURT'S DECISION APPROVING THE PLAN DEALS EXCLUSIVELY WITH MATTERS OF SUBSTANTIVE PENNSYLVANIA LAW

As previously noted, contrary to Petitioners' assertions, the Pennsylvania Supreme Court did find that any impairment of their contract rights which may have been effected by the Plan was not substantial, and did examine the Act and the Plan from the standpoint of the legitimate public interest.

Behind the constitutional "labels" that Petitioners attach to their arguments, there is only one issue raised in the instant Petition: what constitutes a "mutual" debt, under Pennsylvania law, for purposes of the setoff provisions of 40 P.S. § 221.32. The Supreme Court rightly held that case reserves and IBNR, which are unliquidated and contingent as of the date of the filing of a petition for rehabilitation or liquidation, are not "mutual" *under Pennsylvania law* and hence, not subject to setoff. (23a.)

This Court considers itself "bound to accept the interpretation of [state] law given by the highest court of the state," *Hortonville*, 426 U.S. at 488, and has emphasized that decisions of state courts will be subject to disturbance only to the extent that "they incorrectly adjudge *federal* rights." *Ridgway*, 454 U.S. at 54 (emphasis added). Petitioners are merely dissatisfied with the Pennsylvania Supreme Court's interpretation of Pennsylvania law; this is not, and never has been, a basis for seeking review by this Court.

B. THE SPECIFIC CONTRACT PROVISIONS RELIED UPON BY PETITIONERS WERE NOT ENTERED INTO THE RECORDING BELOW

With respect to their claim under Article I, Section 10 of the United States Constitution (the "Contract Clause"), Petitioners have not met their threshold burden of demonstrating that they in fact possess contractual rights altered by the law. *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 472 (1985).

Petitioners are asking this Court to accept their representations as to contract provisions which are not part of

the record. Only one treaty (that of A.I.G. Energy, Inc.) was offered into the record at the hearings on the Plan. However, this treaty is irrelevant to these proceedings because A.I.G. Energy, Inc. is not a petitioner here and was not an appellant below. Moreover, there is nothing in the record to show that this treaty was accepted by the Rehabilitator as "representative" of the many treaties to which Petitioners may be parties, as is suggested in n.3, p. 7 of the Petition. (T. 355-356, 590.)

Relying upon the single treaty offered at the hearings, Petitioners seek belatedly to introduce evidence as to their interpretation of the extent of setoff permitted under their contracts. (*See* Petition, p. 10.) This is not a substitute for a proper record. Even more egregious, however, is Petitioners' representation at page 10, that their treaties "contained no provision affecting either party's offset right in the event of Respondent's rehabilitation." Yet, in a footnote on that same page, Petitioners state that Article XVII of the A.I.G. Energy treaty provides that "in the event of a party's *insolvency*," setoff will be in accordance with New York Insurance Law § 7427. (With the exception of the prohibition against premium setoff, the New York provision is substantially the same as Section 221.32 of the Act.) While Petitioners may be confusing the terms "rehabilitation" and "insolvency," they are also misleading this Court.[7]

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[7] Petitioners suggest, in a footnote on page 12 of their Petition, that Section 221.32(b)(4) of the Pennsylvania Insurance Department Act (which precludes setoff of premium obligations) violates the Contract Clause. However, in their Question Presented for Review (Petition, p. i), and in their arguments in the Pennsylvania Supreme Court, the Petitioners contend only that the *Plan* (not the Act) violates the Clause.

C. THE PENNSYLVANIA SUPREME COURT SPECIFICALLY FOUND THAT PETITIONERS' ALLEGED CONTRACT IMPAIRMENTS WERE INSUBSTANTIAL AND THAT THE PLAN SERVES A LEGITIMATE PUBLIC PURPOSE

Unlike the other Petitioners (at Case Nos. 92-868 and 92-873), Petitioners Rhine, et al., do not argue that they would not fare as well under the Plan of Rehabilitation as they would under a liquidation. *See Neblett v. Carpenter,* 305 U.S. 297 (1938), *reh'g denied,* 305 U.S. 675 (1939). Rather, Petitioners' argument is essentially that their reinsurance contracts are sacrosanct and not subject to modification for any reason, including the rehabilitation or liquidation of the other contracting party, despite the holdings of this Court that any contractual impairment must be substantial before a claim of Contract Clause violation will be considered.

Petitioners conveniently ignore the fact that both the Commonwealth and Supreme Courts of Pennsylvania, as well as the Pennsylvania Legislature, have addressed the far-reaching effects of an insurance insolvency in Pennsylvania, effects which reach beyond the contractual rights of Petitioners, and impact upon thousands of policyholders, creditors and the public generally. Petitioners' determination to protect at all cost their own interests in the event of Mutual Fire's insolvency is in direct conflict with the purpose of the Pennsylvania Insurance Department Act, to-wit, "equitable apportionment of any unavoidable loss." 40 P.S. § 221.1(c). (17a.) If such a cavalier attitude were to prevail, Petitioners could contractually insulate themselves from the efforts of the Legislature and the Pennsylvania Insurance Department to equitably apportion losses. This Court has recognized

that "[s]uch a result cannot be permitted." *Energy Reserves*, 459 U.S. at 416.

The Pennsylvania Supreme Court rightly rejected the Contract Clause challenge raised by Petitioners by demonstrating that the Plan's setoff provisions satisfied the three-part test for constitutional compatibility set forth by this Court in *Energy Reserves:*

> [I]n order to achieve the desired consequence of satisfying all claims in an equitable and orderly manner, the resulting alleged contract impairments [of the Plan] were insubstantial. Furthermore, the significant interest on behalf of the state to regulate the fiscal affairs of its insurers for the welfare of the public would still render the Plan permissible should impairment be found to exist.

(16a, n.4.)

The prohibition in Article I, Section 10 of the United States Constitution against impairing the obligations of contracts "is not to be read literally," *Keystone Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 502 (1987), but must be accommodated to the inherent power of the state "to safeguard the vital interests of its people." *Energy Reserves*, 459 U.S. at 410. The Pennsylvania Supreme Court's decision approving the Plan leaves absolutely no doubt that the Plan, including its setoff provisions, is necessary for the public good as it legitimately and reasonably fosters the goals of rehabilitation *announced by the Legislature, i.e.*, "equitable apportionment" of unavoidable loss. (17a.)

Moreover, the Plan's setoff provisions hardly constitute "special interest" regulation favoring policyholders,

as Petitioners suggest. After all, the Pennsylvania Legislature has established the priority of distribution for creditors of an insolvent insurance company, and has elevated policyholder claims *above* those of reinsurers/cedents. The setoff demanded by Petitioners would wreak havoc with that equitable distribution scheme, and further harm innocent third parties (policyholders) who are dependent upon the financial obligations of these Petitioners to Mutual Fire. As the Pennsylvania Supreme Court noted:

> . . . [T]he exigencies attendant to a major commercial insolvency and the goals of rehabilitation necessitate the reality that "individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public."

(15a-16a), citing *Vickodil v. Commonwealth Insurance Dept.*, 126 Pa. Commw. 390, 559 A.2d 1010, 1013 (1989).

Incredibly, the Petitioners characterize the Court's language as "sheer nonsense" (Petition, p. 17), yet none of the decisions of this Court upon which they rely involved insurance insolvencies. Above all, those cases [*Energy Reserves, Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934); and *Treigle v. Acme Homestead Assoc.*, 297 U.S. 189 (1936)] certainly do not sanction such utter disregard for findings made by a State's Legislature and its highest court with respect to the purpose and effect of such far-reaching remedial legislation.

Petitioners' entire argument in support of review is premised upon a flawed assumption, *i.e.*, that in a liquidation under Section 221.32 (the statute provision upon which they claim to have relied in entering into their

reinsurance contracts), they would have been allowed to offset fully case reserves and IBNR. (Petition, pp. 11-12.) To make this argument, however, Petitioners must ignore completely the Pennsylvania Supreme Court's interpretation of Section 221.32 and of settled Pennsylvania law.

As stated, in considering *Neblett*, the Pennsylvania Supreme Court ruled that Section 221.32 applies to rehabilitations as well as to liquidations. (19a.)[8] Thus, regardless of whether Mutual Fire is in rehabilitation or liquidation, Petitioners would be permitted to set off only "mutual" debts and credits as provided in Section 221.32.[9]

The Court then held that "mutual" debts and credits, *under settled Pennsylvania law,* must be *present, mature* obligations as of the date of the filing of the petition for rehabilitation. According to the Court:

> [N]o right of setoff can be available against a note or other obligation that does not mature until after a receiver for the insolvent debtor is appointed. *Commonwealth ex rel. Bell v. Tradesmen's Trust Company,* 250 Pa. 372, 95 A. 574

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[8] The Court stressed that Section 221.32 begins by stating that its provisions apply to any action or proceeding "under this article." (19a.) The term "article" refers to Article V of the Act, which encompasses both rehabilitations and liquidations. *Id.*

[9] Section 221.32 provides, in pertinent part, that "mutual debts or mutual credits . . . shall be set off and the balance only shall be allowed or paid, except as provided in subsection (b)." Subsection (b) expressly prohibits setoff where, *inter alia,* (1) the obligation of the insurer to the person seeking setoff would not, at the date of the filing of a petition for liquidation, entitle that party to share as a claimant in the insurer's assets and (4) the obligation is to pay premiums, whether earned or unearned, to the insurer.

(1915). *Accord, Appeal of Commonwealth Trust Co. of Pittsburgh,* 324 Pa. 161, 188 A. 200 (1936).

(23a.)

For more than a century, the Pennsylvania Courts had relied upon this basic principle:

> Whatever may be the rights of a party whose debt is due and payable to compel an insolvent debtor to set off a claim against him not due, a party whose debt is not due has no equitable claim to have it set off against a debt of his own already due in the hands of a party who is insolvent.

Dougherty Bros. & Co. v. Central National Bank, 93 Pa. 227, 231 (1880) (citations omitted). This view is still widely accepted. *See, e.g., Liberty Sav. Ass'n v. Sun Bank of Jacksonville,* 572 F.2d 591, 595 (7th Cir. 1978) (" . . . a debt is not subject to setoff unless it has matured. . . . "); *In Re Cabrillo,* 101 Bankr. 443 (E.D. Pa. 1989) (setoff was denied in a bankruptcy proceeding with respect to an installment loan agreement, as opposed to a demand note); *see also FDIC v. Liberty Nat'l Bank & Trust Co.,* 806 F.2d 961, 969 (10th Cir. 1986); *Henz v. Superior Trucking Co.,* 96 F.R.D. 219 (M.D. Pa. 1982).

In conformity with this precedent, the Court simply restated the obvious, that case reserves and IBNR "are not present obligations of the reinsurer":

> Case reserves and IBNR are at most calculations or estimates of future, potential liabilities, which often times are contingent upon a later development or growth of the claim or some intervening procedure such as litigation.

(23a.)[10] It then reached the inevitable conclusion that the unliquidated nature of case reserves and IBNR at the time of the filing of the petition for rehabilitation "does not warrant their being available for setoff. . . . " *Id.* The Pennsylvania Supreme Court's interpretation of Pennsylvania law with regard to "mutuality" is not an adjudication of "federal rights" and thus, is not a subject for review by this Court. *Ridgway*, 454 U.S. at 54.

The record in this case amply supports the decision to limit setoff to liquidated due and owing amounts as of December 4, 1986. At the hearings on the Plan, the Petitioners' own expert testified that, even in non-insolvency situations, the industry-wide practice was to use net balance accounting (setoff) and that it applied *only* to due and owing balances, not case reserves or IBNR. (T. 489, 537-538.) If setoff as practiced within the insurance industry applies only to due and owing amounts, Petitioners

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[10] The category of claims allowed to be set off under the Plan (the "due and owing" amounts) were matured, liquidated obligations of Mutual Fire on the date the Commissioner petitioned for rehabilitation. In the context of a reinsurance agreement, the due and owing amount represents the funds already paid by the primary insurance company, which amount is fixed, readily ascertainable, and currently payable to the primary insurer by the reinsurance company. On the other hand, case reserves are merely the primary insurance company's estimates of the amounts which it may expend in the future in defending, settling or otherwise disposing of claims which have been reported to it. Only future events (*e.g.*, a jury verdict) will determine whether additional funds will be expended on any particular claim and, if so, in what amounts. Likewise, IBNR amounts represent an estimate of expenses that may be incurred on account of events that have occurred but have not yet ripened into claims or been reported to the primary insurance company.

can hardly complain that the same principle in the Plan somehow violates their contract rights.

Not only are the Plan's setoff provisions, as approved by the Pennsylvania Supreme Court, consistent with well-established Pennsylvania legal principles and the factual record, but as stated, they also implement the important public policy behind the Act of maximizing protection to policyholders. 40 P.S. § 221.1(c). Thus, the Pennsylvania Supreme Court correctly concluded that allowing Petitioners to set off obligations against Mutual Fire which had not matured as of the time of filing the petition for rehabilitation (case reserves and IBNR) would result in a "windfall" to Petitioners not available to policyholders. (23a.) Clearly, this should not be permitted.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GEORGE F. GRODE Insurance Commissioner of the Commonwealth of Pennsylvania vs. MUTUAL FIRE, MARINE & INLAND INSURANCE COMPANY	: : : : : : : :	(In Proceedings for the Rehabilitation of a Domestic Insurer) NO. 3483 C.D. 1986

NOTICE OF APPEAL OF AIG RISK MANAGEMENT, AMERICAN CENTENNIAL INSURANCE COMPANY, AMERICAN FINANCIAL CORP., ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY, ATLANTIC MUTUAL FIRE INSURANCE CO., L'UNION CANADIENNE, COVENANT MUTUAL INSURANCE CO., CRUM & FORSTER, EMPLOYERS MUTUAL COMPANIES, EUROPEAN GENERAL REINSURANCE COMPANY OF ZURICH, EXCESS AND CASUALTY REINSURANCE ASSOCIATION, GERLING GLOBAL INSURANCE CORPORATION, THE HARTFORD INSURANCE GROUP, HEDDINGTON INSURANCE, HIGHLANDS INSURANCE COMPANY, THE HOME INSURANCE COMPANIES, IMPERIAL CASUALTY AND INDEMNITY COMPANY, LINCOLN INSURANCE COMPANY, MAIDEN LANE INSURANCE COMPANY, MEAD REINSURANCE CORPORATION, MICHIGAN MUTUAL INSURANCE COMPANY, MID-CONTINENT CASUALTY COMPANY, MONROE GUARANTEE INSURANCE COMPANY, MUTUAL MARINE OFFICES, INC., NATIONWIDE INSURANCE GROUP, NORTH STAR MUTUAL INSURANCE COMPANY, NORTHWESTERN NATIONAL CASUALTY COMPANY, NORWICH UNION FIRE INSURANCE

SOCIETY, LTD., OLD REPUBLIC, PALM DALE INSURANCE COMPANY. PENNSYLVANIA NATIONAL INSURANCE COMPANIES, R.W. STURGE & CO., RESOLUTE INSURANCE COMPANY, RHINE REINSURANCE COMPANY, LTD., ROYAL INSURANCE COMPANIES, ROYAL INSURANCE (UK) LTD., SAFETY MUTUAL CASUALTY CORPORATION, SASKATCHEWAN GOVERNMENT INSURANCE, SCOTTISH & YORK INTERNATIONAL INSURANCE GROUP, SOUTH CENTRAL INSURANCE COMPANY, SPHERE DRAKE UNDERWRITING MANAGEMENT, LTD., TAISHO MARINE & FIRE INSURANCE COMPANY, UTICA MUTUAL INSURANCE COMPANY, H.S. WEAVERS AGENCIES LIMITED, WILLIS FABER (UNDERWRITING MANAGEMENT LIMITED, WAUSAU INSURANCE COMPANIES

Notice is hereby given that AIG Risk Management, American Centennial Insurance Co., American Financial Corp., Arkwright-Boston Manufacturers Mutual Insurance Company, Atlantic Mutual Fire Insurance Co., L'Union Canadienne, Covenant Mutual Insurance Co., Crum & Forster, Employers Mutual Companies, European General Reinsurance Company of Zurich, Excess and Casualty Reinsurance Association, Gerling Global Insurance Corporation, The Hartford Insurance Group, Heddington Insurance, Highlands Insurance Company, The Home Insurance Companies, Imperial Casualty and Indemnity Company, Lincoln Insurance Company, Maiden Lane Insurance Company, Mead Reinsurance Corporation, Michigan Mutual Insurance Company, Mid-Continent Casualty Company, Monroe Guarantee Insurance Company, Mutual Marine Offices, Inc., Nationwide Insurance Group, North Star Mutual Insurance Company, Northwestern National Casualty Company, Norwich Union Fire Insurance Society Ltd., Old Republic, Palm

Dale Insurance Company, Pennsylvania National Insurance Companies, R.W. Sturge & Co., Resolute Insurance Company, Rhine Reinsurance Company Ltd., Royal Insurance Companies, Royal Insurance (UK) Ltd., Safety Mutual Casualty Corporation, Saskatchewan Government Insurance, Scottish & York International Insurance Group, South Central Insurance Company, Sphere Drake Underwriting Management, Ltd., Taisho Marine & Fire Insurance Company, Utica Mutual Insurance Company, H. S. Weavers Agencies Limited, Willis Faber (Underwriting Management) Limited, Wausau Insurance Companies, hereby appeal to the Supreme Court of Pennsylvania from the Order entered in this matter on the 23rd day of January, 1990. This Order has been entered in the docket as evidenced by the attached copy of the docket entry.

FITZPATRICK & TANKER

BY: /s/ Marcy B. Tanker
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